

SERVED: June 9, 1993

NTSB Order No. EA-3899

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of May, 1993

|                                  |   |                 |
|----------------------------------|---|-----------------|
| JOSEPH M. DEL BALZO,             | ) |                 |
| Acting Administrator,            | ) |                 |
| Federal Aviation Administration, | ) |                 |
|                                  | ) |                 |
| Complainant,                     | ) |                 |
|                                  | ) | Docket SE-12496 |
| v.                               | ) |                 |
|                                  | ) |                 |
| MOISES MONTANEZ,                 | ) |                 |
|                                  | ) |                 |
| Respondent.                      | ) |                 |
|                                  | ) |                 |

**ORDER DISMISSING APPEAL**

The Administrator has moved to dismiss the notice of appeal in this proceeding because, among other alleged deficiencies, it was not, as required by Section 821.48 of the Board's Rules of Practice (49 CFR Part 821),<sup>1</sup> perfected by the respondent by the

---

<sup>1</sup>§821.48 **Briefs and oral argument.**

(a) Appeal briefs. Each appeal must be perfected within 50 days after service of an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to

filing of an appeal brief within 50 days after the law judge rendered an oral decision in the matter on January 13, 1993.<sup>2</sup> We will grant the motion, to which respondent has submitted a response in opposition.

Respondent did not appear at his hearing on January 13, 1993, because he is currently incarcerated on a federal drug conviction. Although he sought to have his hearing postponed until such time as he could be present, the law judge was not aware of respondent's desire to continue the matter until counsel for the Administrator, at the hearing, showed him a copy of a January 4, 1993 letter from the respondent requesting a continuance to February, 1994, when he was scheduled to be released from prison. The law judge allowed the Administrator to put on his evidence in support of the revocation order, and, later, he indicated on the record that he would have the Board's Office of Administrative Law Judges immediately advise respondent as to his appeal rights.<sup>3</sup>

(..continued)

perfect his appeal by filing a timely brief.

<sup>2</sup>The law judge affirmed an order of the Administrator revoking "any and all pilot certificates held" by respondent, including commercial pilot certificate No. 580789230, pursuant to section 61.15 of the Federal Aviation Regulations, 14 CFR Part 61, which authorizes the suspension or revocation of the certificates held by an individual who has been convicted in a state or federal court of certain drug offenses.

<sup>3</sup>Notwithstanding various arguments contained in the motion to dismiss, we find it unnecessary to determine whether the law judge's efforts were sufficient, or even intended, to extend respondent's time to file a notice of appeal, or whether they were adequate to authorize his office to extend respondent's time to file an appeal. Respondent's failure to file a timely appeal brief moots, we think, those issues.

We would point out, nevertheless, that we disagree with the Administrator's suggestion that any grant of an extension to file the notice would have been contrary to policy. The requirement that parties to our proceedings show good cause in order to have certain late submissions accepted out of time, consistent with our holding in Administrator v. Hooper, NTSB Order EA-2781 (1988), does not limit our discretion, sua sponte, to extend a filing deadline where doing so may be necessary to avoid a denial of due process.

In this regard, we note that unlike the respondents in Administrator v. Brown, 5 NTSB 526 (1985), or Administrator v. Fleischer, NTSB Order EA-3196 (1990), who either chose not to appear at a scheduled hearing or to ignore the denial of a requested postponement of one, respondent was not free to attend the hearing, and he does not appear to have appreciated the

On February 4, 1993, respondent received from our law judges office a transcript of the January 13th hearing, including the law judge's oral initial decision, along with correspondence, dated February 1, 1993, explaining that his January 4 letter did not reach the law judge before the hearing was convened and containing information on how he could appeal from the law judge's adverse decision in the case. While the respondent filed a notice of appeal of the decision contained in the transcript within 10 days (*i.e.*, on February 8), he did not subsequently file an appeal brief within 50 days of February 1, that is, by March 26, 1993, as the correspondence explicitly advised to do.<sup>4</sup>

Respondent's response to the motion to dismiss provides no explanation for that procedural default.

(..continued)

possibility that the hearing could be held without him in attendance. Indeed, it appears that absent action by the law judge, this pro se respondent likely would not have known that his request for a continuance had not been allowed before the 10 day period for appealing from the law judge's decision on the merits of his appeal had run, and it does not appear that he should have had reason to suspect that that request would or should not be honored. It is therefore far from clear that respondent should have known that a decision might have been entered at a hearing he had tried, with good reason, he believed, to postpone.

Moreover, while appeal advice could, and should, we think, have been relayed to him sooner, respondent is not fairly chargeable with the law judges office's two-week delay in advising him, inter alia, that the hearing had taken place without him.

<sup>4</sup>Respondent did not file an appeal brief until April 9, 1993.

Absent a showing of good cause that would provide a basis for excusing the respondent's failure to file a timely appeal brief, his appeal must be dismissed. See Administrator v. Hooper, supra.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's motion to dismiss is granted, and
2. The respondent's appeal is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.